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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

NEWMAN OIL COMPANY, et al.,
Respondents.

REPLY BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY

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August 21, 1979

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The Brief In Opposition by Plaintiffs (Respondents in this Court and Appellants in the Temporary Emergency Court of Appeals) maintains that the petitions for writ of certiorari by Atlantic Richfield Company (No. 78-1898) and by Albert B. Alkek and Foremost Petroleum Corporation, Inc. (No. 78-1906) intentionally disregard Plaintiffs' supposed federal cause of action under 10 C.F.R. § 205.203(f), for which reason the petitions for writ of certiorari assertedly should be denied as "wholly without merit."

The assertion of an express and/or implied private cause of action under 10 C.F.R. § 205.203(f) is a reiteration of exactly the same argument made by the Plaintiffs to the Temporary Emergency Court of Appeals. *See* Appellants' Post-Submission Brief. However, the opinion and decision by the Temporary Emergency Court of Appeals eschewed holding that such a private cause of action exists, and construed the claims by Plaintiffs as merely "involving common-law fraud." *See* Opinion p. 6 (A-7)[1]. As the Reply

[1] All appendix page references in this Reply Brief are to the Appendix in the Petition for a Writ of Certiorari previously filed by Atlantic Richfield Company.

Memorandum of Petitioners Albert B. Alkek and Foremost Petroleum Corporation, Inc. in this Court ably demonstrates (which Reply Memorandum Atlantic Richfield Company generally adopts and incorporates herein), such a supposed cause of action based on 10 C.F.R. § 205.203(f) was never properly raised by the Plaintiffs in their trial court pleadings, has never received recognition or approval by either the trial court or the Temporary Emergency Court of Appeals, and fails as a matter of law to support Plaintiffs' complaint of price overcharges.

Even more fundamentally, Plaintiffs' argument still directly conflicts with this Court's decision in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the case on which the petitions both of Atlantic Richfield Company (No. 78-1898) and of Albert B. Alkek and Foremost Petroleum Corporation, Inc. (No. 78-1906) are principally based.

Plaintiffs' theory of liability, as expressed in Respondents' Brief in Opposition, alleges that the Petitioners fraudulently obtained the Plaintiffs' signatures on the three-party agreements [*see* Three-Party Agreement (Model), at A-29 to A-31]. Plaintiffs further state that the three-party agreements were submitted to the Federal Energy Administration, which then ordered that Foremost Petroleum Corporation, Inc. would become the new supplier for the Plaintiffs. This order by the FEA, Plaintiffs maintain, allowed Foremost Petroleum Corporation to charge the Plaintiffs a higher regulated price than the price which Atlantic Richfield had formerly been allowed by the regulations to charge the Plaintiffs. *See* Respondents' Brief In Opposition, p. 7.

By the express terms of the three-party agreements, Foremost Petroleum Corporation, Inc. was to be designated

as the Plaintiffs' new supplier pursuant to 10 C.F.R. § 211.9(a)(2)(i), which provides as follows:

> Unless otherwise provided in this part or directed by FEA, the supplier/wholesale purchaser-reseller relationships defined by specific dates or base periods or otherwise imposed pursuant to this part shall be maintained for the duration of the Mandatory Petroleum Allocation Program and may not be waived or otherwise terminated without the express written approval of FEA.

The law is quite clear that any changes in the supplier/wholesale purchaser-reseller relationships ordered by FEA are discretionary acts by the Agency. *Amtel, Inc. v. FEA*, 536 F.2d 1378 (TECA 1976).[2] For this reason Plaintiffs'

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[2] As stated in *Amtel, Inc. v. FEA, supra,*

> By requiring the attainment of the specified objectives of the Allocation Act "to the maximum extent *practicable*" (emphasis added), 15 U.S.C. § 753(b)(1) (1976 Supp.), Congress recognized that the objectives were to a certain extent inconsistent and intended that the FEA would exercise its discretion in achieving a workable balance among them.

536 F.2d at 1383.

> [S]uch cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted. * * * It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.

536 F.2d at 1384, quoting from *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 574, 580-584 (1940)

contention that the FEA did not exercise its discretionary authority in replacing Atlantic Richfield Company as Plaintiffs' supplier (and according to Plaintiffs, increasing the maximum price chargeable to Plaintiffs) cannot be sustained.

As in *Montana-Dakota*, Plaintiffs are caught between Scylla and Charibdis. To the extent that the Plaintiffs maintain that the FEA's designation of Foremost Petroleum Corporation, Inc. as the Plaintiffs' new supplier was the cause of the increased charges ("injury") to the Plaintiffs, *Montana-Dakota* forbids any court (federal or state) from invading the agency's discretionary jurisdiction by speculating as to what action the FEA would have taken absent the alleged fraud.[3] If the Plaintiffs were to maintain that the FEA's orders were not the cause of their injury, their cause of action would be one merely for common-law fraud, which *Montana-Dakota* requires be brought in state court, absent diversity of citizenship jurisdiction. In neither instance would the federal courts now have jurisdiction over the Plaintiffs' cause of action.

The Temporary Emergency Court of Appeals has been misled into violating this Court's decision in *Montana-Dakota*. If federal courts are to avoid infringing the exclusive discretionary jurisdiction of federal agencies and the common-law jurisdiction of state courts, the door opened by the Temporary Emergency Court of Appeals in this case must be closed now by this Court.

[3] That the FEA had the power to substitute Foremost Petroleum Corporation, Inc. for Atlantic Richfield Company, without Plaintiffs' consent, is clear. *See, e.g.*, 10 C.F.R. § 211.14(d).

For the reasons stated previously, the petition for writ of certiorari should be granted.

Respectfully submitted,

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